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IN THE

# Supreme Court of the United States

OCTOBER TERM 1956

No. ~~1027~~. 136

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, *et al.*,

*Petitioners,*

*against*

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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June 19, 1957

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Petitioners,

*against*

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is filed on behalf of Grumman Aircraft Engineering Corporation (hereinafter referred to as "Grumman"), the respondent herein, in opposition to the petition of the Board of Assessors of the Town of Riverhead, New York, and the Town of Riverhead (hereinafter referred to as "petitioners"), for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York and the judgment of the Supreme Court of the State of New York, Suffolk County, entered thereon, holding certain local tax assess-

ments against Grumman on the Town Roll to be illegal, erroneous and void for lack of statutory authority in the assessors to assess such property for taxation under the laws of the State of New York.

## Question Presented.

The petitioners list five questions claimed to be presented by their application. But the first four of these questions merely rephrase with argumentative matter the one question set out as follows in the order of the New York Court of Appeals entered on petitioners' motion for reargument or for amendment of the remittitur to show that "questions arising under the Constitution and laws of the United States were argued and decided":

> "Respondents [petitioners in this Court] argued that, under the appropriate provisions of the Constitution of the United States which define the powers of the federal government (Article IV, clause 3; Article I, clause 18 and Article VI, clause 2), the Act of August 5, 1947 (c. 493, §6, 34 U. S. C. §522e) and the contract between appellant and the United States government entered into in pursuance thereof mandated that the property involved herein be made subject to local taxation. This Court held that such taxation was not mandated". (Appendix to Petition, p. 59).

The only contention of the petitioners made below and bottomed on a claim of rights conferred upon them by the Constitution and laws of the United States sufficient to validate the local tax assessments involved in this proceeding is that described in the above-quoted order of the New York Court of Appeals. Such contention was first made in the motion by petitioners to reargue the Court of Appeals

decision, which was denied; or for amendment of that Court's remittitur, which was granted.

Grumman submits that the decision of the New York Court of Appeals denying petitioners' contention, as is reflected in the above-quoted order, is the only federal question presented and decided in this case. Rephrasing that same question in four ways is purely argumentative.

The fifth question listed as presented and the excerpts quoted on page 6 of the Petition from Grumman's protest to the local Board of Assessors and from Grumman's petition to the Supreme Court, Suffolk County, New York relate to an alternative contention made *by Grumman* below that if the local assessments in question were deemed authorized by any New York statute, the assessments were *ipso facto* against real estate owned in fee by the United States and were, therefore, illegal because not within the partial waiver of the United States' immunity granted by 34 U. S. C., §522e. If the New York courts had held the assessments authorized under any New York Statute and had proceeded to deny this alternative contention of Grumman, review of such denial by this Court at the instance of Grumman might have been proper. In fact, however, the New York courts sustained the primary contention of Grumman made in Grumman's protest to the Board of Assessors and in its petition to the Supreme Court, Suffolk County, that:

> "The assessments are illegal because they are not authorized by the Tax Law of the State of New York" (R. 43) (Protest).
>
> "That the assessments against this petitioner described in paragraph 6 herein are illegal, erroneous and void and therefore excessive on ground that this petitioner does not have any interest in said real property subject to assessment and tax within the provisions of the Tax Law of the State of New York,

> Article I, Section 4, Subdivision 17, or any other provision of the Tax Law; * * *" (R. 13) (Petition).

The Court of last resort in New York, having found that the New York statutes did not authorize the assessments complained of, also voiced its approval of Grumman's alternative contention. While Grumman submits that the approval by the New York Court of Appeals of its alternative contention was entirely correct, such approval did not constitute under the practice in this Court a decisive determination of a federal question in view of the alternative nature of the point involved which was reached only by way of dictum or alternative holding. Since the New York Court of Appeals first held that the New York law did not authorize the petitioners to make the assessments, all else that was said was dictum. As a matter of long-settled practice, this Court regularly declines to review decisions of State courts decided on a State law ground adequate to support the decision even though a federal question was involved in an alternative holding in the State courts.

A clearer case for application of this well-settled rule is difficult to conceive. The New York Court of Appeals has held that the New York statutes do not authorize assessment of a particular item of property for taxation by a local government of the State of New York. This is plainly a State court decision adequately grounded on a State law determination. The federal point under discussion is reached only by way of a statement that "even if" the assessment were authorized by the State law, it would be illegal because made in disregard of State law dictates as to valuation or invalid because going beyond the limited waiver of immunity granted by federal law. The remarks of the Court below on this federal point are plainly by

way of dictum or, at most, made in respect of a subsidiary portion of an alternative holding.

Grumman submits that the fifth question alleged to be presented should not be considered here because the result reached below is supported by an adequate State ground; and that the sole question presented is therefore that set out in the above-quoted order of the New York Court of Appeals amending the remittitur.

## Statement of the Case.

Throughout the Petition herein and particularly in petitioners' Statement of the Case, there is present an implication that the New York Court of Appeals considered and decided a claim of Grumman that its interest sought to be assessed was exempt from taxation by the State of New York. This simply is not so. Rather, the Court considered (1) that the fee simple ownership of the property by the United States was exempted by State law from taxation by the Town; and (2) that the interest of Grumman in the property under its lease thereof was not taxable by the Town under the laws of New York because (a) such interest did not constitute "real property"—the only type of property taxable by New York local governments under Section 3 of the New York Tax Law (Appendix to Petition, p. 27), and (b) the rights of Grumman in respect of the property were not such as to authorize the assessments under Section 4(17) of the New York Tax Law, which permits taxation of Government-owned real property occupied by private persons under certain specified circumstances (Appendix to Petition, pp. 28-29). The dissenting judges in the New York Court of Appeals disagreed with the majority holding on the last

mentioned point as to the construction of Section 4(17) of the New York Tax Law—clearly a question of State law.

The Statement of the Case in the petition omits the primary contention of Grumman, sustained below, that the assessment for taxation of its interest in the property was not authorized by New York law. The Statement also fails to point out the limited nature of the single federal question found by the Court of Appeals to have been considered and decided, and fails to indicate the highly conditional nature of Grumman's right of first refusal contained in its lease. The portion of the Statement to the effect that the assessors deemed the interest of Grumman as severed for tax purposes from exempt Government ownership and the characterization of Grumman's interest as "fractional" find no support in the Record. The Statement also seeks to explain the use of language in the assessments clearly showing the intention of the assessors to proceed under the claimed authority of Section 4(17) of the New York Tax Law (which is not an exempting provision but one authorizing taxation of real property owned by the United States when occupied by private persons under specified circumstances) by implying that the use of such language was required even if the assessors were not purporting to proceed under Section 4(17). Grumman submits that there is no such requirement.

Furthermore, the statement fails to indicate that the consideration below of the applicability and effect of the decision of this Court in *United States* v. *County of Allegheny*, 322 U. S. 174 (1944) related to Grumman's above-described secondary or alternative contention that the assessments would be illegal as a matter of federal law, even if the New York law had been found to authorize them, which it did not.

Under the circumstances, Grumman respectfully refers the Court to the opening paragraphs of the opinion of the New York Court of Appeals (Appendix to Petition, pp. 41-45), for a Statement of the Case for the purposes of this proceeding.

## ARGUMENT.

### I.

**The decision below correctly holds the federal statute to be permissive. No mandatory invasion of the power of the New York State Legislature to delimit the objects of taxation by New York local governments was intended. No federal question of substance is presented.**

The criteria applicable to determinations as to whether or not the judgment of a State court shall be reviewed by this Court, set forth in Rule 19(1)(a) of this Court, indicate clearly that the federal question decided by the State court must be one of substance.

The question which petitioners now seek to bring to this Court, having raised the point for the first time in a motion to reargue the case or for amendment of the remittitur following the decision of the New York Court of Appeals, is the question of whether or not a federal statute, 34 U. S. C. §522c, mandated that the interest of Grumman under a lease of Government-owned property made pursuant to 34 U. S. C. §522a be taxable by the Town of Riverhead, New York, and created in the Town a federal right and privilege to impose taxes thereon, despite the fact that the New York statutes have been held by the highest court in the State

not to authorize such taxation by the Town. The federal statute provides, in relevant part, as follows:

> "The lessee's interest, made or created pursuant to the provisions of sections 522a-522c and 522e of this title, shall be made subject to State or local taxation." 34 U. S. C. §522e, 61 Stat. 775 (1947).

The Court below held, and we submit properly so, that this federal statute was permissive, rather than mandatory. It is important to note that the judges of the New York Court of Appeals were unanimous in this conclusion. Thus, the majority opinion states:

> "The Federal statute is, however, *permissive* only and no tax is possible unless local law authorizes and provides for it." (Emphasis supplied) (Appendix to Petition, p. 48)

The dissenting opinion states:

> "The sole question presented, therefore, is whether the Tax Law of this state provides for the assessment and taxation of Grumman's interest * * *." (Appendix to Petition, p. 51)

Petitioners seek to characterize the decision of the New York Court of Appeals as to the proper construction of this statute as depriving the Town of a federal right to tax the interest of Grumman, irrespective of the extent of the taxing powers of the Town under the law of the State; and apparently take the position that the New York Tax Law, if construed as not authorizing taxation of Grumman's interest by the Town, is invalid as repugnant to the Constitution and laws of the United States. Acceptance of this proposition would be novel doctrine indeed, requiring, as it would, the creation by this Court of New York law authorizing the Town to impose the tax.

In any event, the position of the New York Court of Appeals as to the proper construction of the statute as permissive, not mandatory, is submitted to be clearly correct on the basis of a mere reading thereof, as well as on the basis of the authorities hereinafter cited on the point. And, it seems entirely clear to Grumman, incorporation of the statutory language in the lease document cannot add to or vary the meaning and effect thereof although petitioners appear to make some contention otherwise. (Petition, pp. 12-14).

Even without consideration of the Constitutional inhibitions on the power of Congress to interfere in the internal affairs of the States, it is entirely clear from the legislative history that Congress in enacting 34 U. S. C. §522e intended to and did no more than to *permit* State or local taxation of a lessee's interest under a lease of United States property made under the authority of the statute, if and to the extent that the applicable State law authorized such taxation.

Senator Baldwin, who was in charge of the bill which became the law under discussion, explained to the United States Senate when the bill was up for passage that:

> "Section 6 [which became 34 U. S. C. §522e] expressly provides that the lessee's interest in property leased under the bill *may* be the subject of taxation by State or local authorities." 93 Cong. Rec., 9798 (80th Cong., 1st Sess., July 23, 1947). (Emphasis supplied.)

Such Congressional intention is further borne out by the 1956 reenactment of Section 522e, as noted in the opinion of the New York Court of Appeals (Appendix to Petition, p. 44), to provide that:

> "The interest of a lessee of property leased under this section *may* be taxed by State or local governments." 10 U. S. C. §2667 (e), 70A Stat. 150 (1956). (Emphasis supplied.)

This clearly permissive language is declaratory of the prior law. SENATE REPORT No. 2484, 84th Cong., 2d Sess., Part III, Par. 5 (July 9, 1956), p. 19.

These evidences of legislative intention unmistakably show that 34 U. S. C. §522e is a partial waiver of immunity, not a Congressional effort to interfere in the internal affairs of the States.

Indeed, Congress by the very language used in §522e shows that it left to each State the decision as to whether or not the interests of lessees under leases authorized by the federal statute should be taxed by the State itself or by its local political subdivisions. The phrase used was "State *or* local taxation." Congress, by the use of the disjunctive, clearly recognized the right of each State to allocate permissible objects of taxation among its various governmental units. The precise terminology of the federal statute thus provides a clear indication that the power of a local political subdivision to tax such interests raises only a State law question.

And the permissive nature of the Federal statute is further shown by the fact that, at its 1956 session, the New York Legislature passed a bill (A. I. 2178, Pr. 4215) amending the New York Tax Law to authorize taxation of Grumman's interest under its lease. This bill was vetoed by the Governor, the veto message reading in part as follows:

> "The present law authorizes localities to impose a real estate tax, at the full value of the property, on the person who is in use, occupation, or possession

of real property, even though the title to such property is in the United States or the State of New York.

"This bill seeks to amend the law so as to enable the Town of Riverhead to tax 4,500 acres of land owned by the United States Navy, but occupied and used by the Grumman Engineering Corporation. The changes imposed by this bill, however, go beyond such intention. One of the amendments provides that the assessment of the real property shall no longer be at the full value of such property, but on the value of the interest in the property. This particular change would lead, in my opinion, to considerable dispute because it is so indefinite. * * *" New York State Legislative Annual (1956) p. 544.

Accordingly, it is unnecessary to consider the obstacles (which are, in Grumman's view, insurmountable) to the requested determination that the powers of Congress in respect of disposition of Government property provided in Article 4, §3, Clause 2, its incidental powers under Article 1, §8, Clause 18 and the rule of Article 6, Clause 2 of the Constitution would authorize the Congressional action which petitioners seek to read into 34 U. S. C. §522e, in the face of the Tenth Amendment to the Constitution and the freedom of the States from federal control over or interference with the system of property taxation adopted by each State for itself and its creatures, the local governments.

As would be expected, the Courts have considered that State-law authorization to tax is a *sine qua non* of local taxation of the lessee's interest under a lease of United States property.

In *Squantum Gardens, Inc.* v. *Assessors of Quincy*, 140 N. E. 2d 482 (Mass. Feb. 11, 1957) (not yet officially reported), the Massachusetts Supreme Judicial Court, in holding that the Massachusetts statutes there relied upon

did not authorize local taxation of the interest of a lessee of United States property, said:

> "2. The propriety of the final decree [enjoining the attempted taxation] must be determined on the basis of analysis of (a) the applicable acts of the Congress authorizing taxation, by the States and their subdivisions, of property owned by the United States and leased to private corporations and individuals; (b) *the Massachusetts statutes authorizing assessment of real estate taxes;* and (c) the administrative action taken by the assessors in assessing the taxes here in issue.
>
> * * * *
>
> "Compliance with the Congressional permission thus has two aspects. It means both (1) that the State tax statute must authorize a tax of the character permitted by the Congress, and (2) that the administrative action of assessment and collection must comply with the Congressional and State statutory authorization." (p. 485) (Emphasis supplied)

And in *Fort Dix Apartments Corp.* v. *Borough of Wrightstown,* 225 F. 2d 473 (3d Cir. 1955), *cert. denied,* 351 U. S. 962 (1956), a case sustaining local New Jersey taxation of a lessee's interest in United States property and referred to with approval by this Court in *Offutt Housing Co.* v. *County of Sarpy,* 351 U. S. 253, 258-59 (1956), the Court said:

> "Beyond congressional permission to tax, it is also necessary to the validity of the local taxes here that, pursuant to such permission, the state have granted the municipalities the power to levy the tax in question." (p. 476)

It should also be noted that petitioners' assertion that Grumman pays a lower rental than it otherwise would

because the Government fixed Grumman's rental at a smaller amount to allow for Grumman's liability to local taxation of its interest under the lease, and the assertion or implication that the United States makes payment to the Town in lieu of taxes on Grumman's interest in the property (Petition, p. 11) are absolutely without foundation in the Record.

## II.

### The Court below decided the federal question involved in accord with applicable decisions of this Court.

The petition asserts that the New York Court of Appeals has misinterpreted and misapplied this Court's decision in *United States* v. *County of Allegheny*, 322 U. S. 174 (1944), and that the decision of the New York Court of Appeals is not in accord with applicable decisions of this Court. (Petition, pp. 9, 13)

As respects the *County of Allegheny* case, it is important to note that the Court below did not refer to that case in reaching its decision on the proper interpretation and effect of 34 U. S. C. §522e, the only federal question decided below. The *Allegheny* case was referred to only in connection with Grumman's secondary and alternative contention that the assessments were illegal under federal law if found authorized by State law. It is submitted that the Court below correctly applied the decision of this Court in the *Allegheny* case in approving Grumman's alternative contention, but it is further pointed out that even if such were not the case, any possible misapplication of the *Allegheny* case would be in respect of a dictum or, at most, a subsidiary portion of an alternative holding,

review of which would be futile (as well as at variance with the long-settled practice of this Court), since the *decision* of the Court below was adequately grounded on a determination of State law.

Except for *Offutt Housing Co.* v. *County of Sarpy*, 351 U. S. 253 (1956), discussed *infra*, the cases in this Court cited by petitioners in support of their claim that the New York Court of Appeals decision on the federal question herein is not in accordance with applicable decisions of this Court have nothing to do with 34 U. S. C. §522e, the federal statute involved. Most of the cited decisions, in Grumman's view, are entirely unrelated to the question sought to be raised by the petitioners in this application. They involve, rather,

(1) Construction of a North Carolina statute granting lands to a private individual as immediately effective, despite use of the future tense in the statutory language. *Rutherford* v. *Greene*, 2 Wheat (15 U. S.) 196 (1817)

(2) The power of Congress with respect to grants of and claims for public lands. *United States* v. *San Francisco*, 310 U. S. 16 (1940) (power to grant public lands to city on condition that electric power generated by use of the granted lands not be distributed by private utilities); *United States* v. *California*, 332 U. S. 19 (1947) (power to forego claim to tidelands); *United States* v. *Gratiot*, 14 Peters (39 U. S.) 526 (1840) (power to authorize lease of Government property); *Ruddy* v. *Rossi*, 248 U. S. 104 (1918) (power to exempt public lands from liability for debts of homesteader contracted prior to issuance of patent therefor); *Light* v. *United States*, 220 U. S. 523 (1911) (power to prevent grazing of cattle on public domain).

(3) Effect of grants of public land (not taxing powers) to local governments by Congress. *Jones* v. *Soulard*,

24 How. (65 U. S.) 41 (1860) (inclusion of accretions in grant bounded by river); *Kissell* v. *St. Louis Public Schools*, 18 How. (59 U. S.) 19 (1855) (lands granted for school purposes not subject to preemption).

(4) General construction of statutes to admit all parts of them to stand, if possible. *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S. 634 (1876) (construction of Nevada Enabling Act).

(5) Lack of power in the State to interfere with Congressional power to dispose of federal property. *Gibson* v. *Chouteau*, 13 Wall. (80 U. S.) 92 (1871) (possession of public lands before issuance of patent for period of State statute of limitations does not control title subsequently conveyed by patent).

(6) "Liberal" rules of construction applicable to the Miller Act and its predecessor requiring filing of bonds by Government contractors for the benefit of suppliers. *Brogan* v. *National Surety Co.*, 246 U. S. 257 (1918) (groceries supplied to a contractor and consumed by laborers held materials supplied and used in prosecution of public work); *Standard Accident Insurance Co.* v. *United States*, 302 U. S. 442 (1938) (railroad furnishing transportation of materials for structure held to have furnished labor or materials used in construction of a public building); *MacEvoy Co.* v. *United States*, 322 U. S. 102 (1944) (bond does not protect supplier of materials to a materialman of a Government contractor); *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349 (1926) (determination of period of limitations in respect of suits on bond); *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 916 (1903) (effect of extension of time on surety's obligation under bond).

(7) Construction of statute validating a land patent. *McCarthy* v. *Mann*, 19 Wall. (86 U. S.) 20 (1873).

(8) Power of this Court finally to determine the meaning and effect of contracts to which the United States is a party. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946) (State may tax vendee-in-possession of Government-owned land).

(9) Supremacy of federal law over conflicting State law. *Case* v. *Bowles*, 327 U. S. 92, 102 (1946) (applicability of Emergency Price Control Act to State sales).

A few of the cited decisions of this Court deal with immunity of federal property and transactions from State taxation. These decisions, to the extent relevant to the issue in this proceeding, support the decision below in that in each such case State-law authority existed for imposition of the disputed tax and the problem dealt with by this Court was the existence and extent of any waiver of federal immunity. These cases involved:

(1) Existence and extent of federal waiver of immunity as respects taxation of the interest of a lessee of federally-owned Wherry Act housing. *Offutt Housing Co.* v. *County of Sarpy*, 351 U. S. 253 (1956). This Court was careful to point out, in affirming a decision of the Nebraska Supreme Court sustaining Nebraska taxation of the lessee's interest, that the Nebraska Attorney General had ruled that such interest was taxable as personal property under the Nebraska law.

(2) Construction of federal statute providing that "no lands granted to any railroad corporation by any Act of Congress shall be exempt from taxation by States, Territories and municipal corporations on account of the lien of the United States upon the same" for certain costs, with provisos which, among other things preserved the lien as against the purchaser of any such lands sold for taxes. *Central Pacific R. R.* v. *Nevada*, 162 U. S. 512 (1896). In

this case, the Supreme Court of Nevada had held that certain lands granted to the railroad were taxable but that others were not. This Court affirmed the decision below. The statement of the case contains the following sentence:

> "The State being bound by the decision of its Supreme Court that the 195,200 acres of unsurveyed lands were not taxable, was not entitled, and did not attempt to sue out a writ of error." (p. 514)

In the course of its opinion this Court said:

> "It does explicitly appear that authority was given by Congress to the States to tax these lands; but whether, under the state laws, the railroad had any taxable interest therein, or whether the decision of the court that it had no such interest in the unsurveyed lands is consistent with its opinion that it had such interest in the surveyed lands, is immaterial, so long as no Federal right was denied to it. * * *" (p. 523)

(3) Applicability of State franchise and unemployment taxes to private operators of bath houses on a federal reservation. *Superior Bath House Co.* v. *McCarroll*, 312 U. S. 176 (1941) (federal consent to taxation construed to include franchise tax); *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358 (1939) (implied Congressional consent to unemployment tax found).

(4) Unconstitutionality of Arkansas Gross Receipts tax as applied to purchase in Arkansas of tractors for the Government. *Kern-Limerick Inc.* v. *Scurlock*, 347 U. S. 110 (1954).

(5) Unconstitutionality of State taxation of personal property owned by the United States and bailed to a private person, in the absence of a waiver of federal immunity. *United States* v. *County of Allegheny*, 322 U. S. 174 (1944).

Finally, in reaching its conclusion that the New York Tax Law does not authorize the assessments involved in this proceeding, the New York Court of Appeals applied the New York rule that a taxing statute is to be construed against the taxing authority. Petitioners' efforts to seek review in this Court of this State court determination on a question of a rule of construction of a State statute should be wholly unavailing.

## Conclusion.

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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June 19, 1957.